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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDMOND OWENS,

Defendant and Appellant.

B213493

(Los Angeles County
Super. Ct. No. BA344267)

APPEAL from a judgment of the Superior Court of the County of Los Angeles,
Rand S. Rubin, Judge. Affirmed in part, reversed in part, and remanded with directions.

Susan Morrow Maxwell, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant
Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Erika D.
Jackson, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Edmond Owens (defendant) guilty of attempted possession of cocaine base. On appeal, he contends that the trial court abused its discretion when it denied his *Pitchess*¹ motion for the production of the personnel records of one of the two police officers who testified against him. Defendant also requests that we review the record of the trial court's in camera proceeding concerning the discovery of the personnel records of the other officer who testified at trial. And, defendant contends that the trial court erred when it ordered him to pay attorney fees without conducting a hearing on his ability to pay those fees and without any evidence in the record as to the amount of those fees.

We hold that the trial court did not abuse its discretion in denying the *Pitchess* motion as to one of the two officers who testified, that the trial court correctly concluded after an in camera review that there were no discoverable documents as to the other officer, and that there is insufficient evidence to support the order requiring defendant to pay attorney fees. We therefore affirm the judgment of conviction, but reverse the order requiring defendant to pay attorney fees and remand the matter to the trial court with directions to hold a hearing on defendant's ability to pay attorney fees.

FACTUAL BACKGROUND

On July 29, 2008, Los Angeles Police Officer Marco Oropeza was working undercover at 2945 Leeward Avenue, Los Angeles, a six-unit, single story apartment complex. The complex was in an area known for drug trafficking. Officer Oropeza was standing just inside the front gate to the complex in the courtyard. Defendant approached the officer and asked for \$14 worth of narcotics. When Officer Oropeza asked defendant the type of narcotic he wanted, defendant replied "rock," which Officer Oropeza

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

understood to be street vernacular for cocaine base. Defendant handed the officer folded money and the officer handed defendant three wafers that resembled cocaine in wafer form,² but which were made from pasta noodles.

After defendant received the wafers, he walked away from the location eastbound. Just after the transaction with defendant, Officer Oropeza made another transaction with a second man. Immediately after that second transaction, Officer Oropeza gave a prearranged signal to his partner, Detective Gasca, who directed uniformed officers to detain defendant. The man who made the second transaction ran from the officers who did not pursue him. Between the time of the transaction and the time defendant was detained, Officer Oropeza maintained continuous visual contact with defendant. The uniformed officers brought defendant back to the apartment complex and Officer Oropeza walked defendant to the back where a processing center had been set up.³ To Officer Oropeza's knowledge, the wafers he gave to defendant were not recovered.

On July 29, 2008, Los Angeles Police Detective Luis Gasca was assigned to the Rampart narcotics enforcement detail. He was part of a task force investigating narcotics sales at 2945 Leeward Avenue. He was standing inside the wrought iron gate to that property with his partner, Officer Oropeza. He was three to four feet to the right of Officer Oropeza near a one-way transmitting device that was monitoring what was said at the location. At about 11:00 p.m., he observed two men approach their location. Defendant approached Officer Oropeza and handed the officer some money. The man with defendant also had money. Detective Gasca broadcast to the detective monitoring the one-way transmitting device that there might be a double transaction. When Officer Oropeza gave word that the first transaction had been completed, Detective Gasca announced, "stand by." When he heard the second code word signaling that the second transaction had been completed, Detective Gasca informed the monitoring detective to

² The police report referred to the wafers as "facsimile wafers of cocaine base."

³ That evening, Officer Oropeza's task force made nine arrests within an hour and a half.

send the uniformed chase officers to detain the suspects. Detective Gasca maintained continuous visual contact with defendant from the time of the transaction to the time defendant was detained by the chase officers. The chase officers detained defendant, but the other suspect ran and the officers did not give chase.

PROCEDURAL BACKGROUND

The Los Angeles County District Attorney charged defendant in an information with attempted possession of a controlled substance, cocaine base, in violation of Health and Safety Code section 11350, subdivision (a) and Penal Code section 664⁴—a felony. The District Attorney alleged that defendant had suffered three prior convictions of serious or violent felonies within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i). The District Attorney further alleged that defendant had suffered a prior conviction for which a prison term was served within the meaning of section 667.5, subdivision (b). The District Attorney also alleged that defendant had been convicted of four felonies within the meaning of section 1203, subdivision (e)(4), such that he would be ineligible for parole if convicted.

Prior to trial, the trial court dismissed two of the strike allegations at the prosecutor's request, and defendant admitted the remaining strike allegation. Defendant made a motion for discovery pursuant to *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531, that the trial court granted as to Officer Oropeza, but denied as to Detective Gasca. Following an in-camera hearing concerning personnel records relating to Officer Oropeza, the trial court ruled that there were no discoverable documents.

Following a jury trial, defendant was found guilty as charged. Defendant admitted one prior conviction within the meaning of sections 667.5, subdivision (b) and 1203, subdivision (e)(4) and the prosecutor agreed to strike the other special allegations.

The trial court sentenced defendant to the middle term of one year, doubled to two years pursuant to the admitted prior strike. Pursuant to section 1385, the trial court struck

⁴ All further statutory references are to the Penal Code unless otherwise indicated.

the admitted prior conviction within the meaning of section 667.5, subdivision (b). The trial court also ordered defendant to pay attorney fees in the amount of \$2,755.

DISCUSSION

A. *Pitchess* Motion as to Detective Casca

Defendant contends that the trial court abused its discretion when it refused to conduct an in camera hearing with respect to the personnel records of Detective Gasca. According to defendant, the declaration of his trial counsel, the police report, and the preliminary hearing transcript established a plausible scenario of officer misconduct on the part of Detective Gasca.

1. Background

The declaration of defendant's counsel provided, in pertinent part: "It is necessary that these materials be made available to the defendant in order to properly prepare this case for motions and trial. The requested discovery is material and relevant and necessary for the defense preparation for the following reasons: [¶] According to their report, Officer Oropeza (#33175) and Detective Gasca (#30765) conducted a Narcotic Task Force sale in plainclothes in the area of Leeward Ave. and Westmoreland. The Officers were approached by 2 males-[defendant], and an unknown suspect (Suspect 2). [Defendant] asked Officer Oropeza for fourteen dollars worth of "rock." [Defendant] gave Officer Oropeza the money in exchange for 3 wafers of facsimile cocaine base. Suspect 2 then asked Officer Oropeza for ten dollars worth and Officer Oropeza gave Suspect 2 two facsimile wafers of cocaine base. [Defendant] and Suspect 2 walked eastbound from the location. [¶] After this, Officer Oropeza signaled the chase officers to have both suspects arrested. Officers Arevalo (#35784) and Solorio (#36103) arrested [defendant]. The officers did not find any facsimile on [defendant]. Suspect 2 ran away and the Officers were unable to apprehend him. [¶] *Upon information and belief, the police officers falsified their report and preliminary hearing testimony to justify*

[defendant's] arrest. [Defendant] never approached the Officers, asked Officer Oropeza for fourteen dollars with of “rock,” or received 3 wafers of facsimile cocaine base. [¶] Upon information and belief, [defendant] drove a passenger (Suspect 2) to Leeward Ave., and Westmoreland. Suspect 2 exited the car and [defendant] remained in the car. Suspect 2 approached the plainclothes officers, engaged in the transaction and thereafter fled the scene. The Officers approached [defendant] in his car and demanded information on Suspect 2. [Defendant] told the Officers that he only knows Suspect 2 as ‘DL’ from the park. [Defendant] informed the Officers that he did not know DL therefore was unable to provide further information. The Officers got upset and accusatory towards [defendant]. The Officers subsequently arrested [defendant] as the suspect involved in the transaction. [¶] Upon information and belief, [defendant] remained in the car the entire time and did not attempt to purchase narcotics. The Officers arrested [defendant] because they were upset that they lost Suspect 2 and because [defendant] could not provide them Suspect 2’s information.” (Italics added.)

The police report, which was written by Officer Oropeza and attached to defendant’s *Pitchess* motion, provided in pertinent part: “Investigation: At approximately 2250 hours, Det. Gasca and I were standing in front of 2945 Leeward Ave. near the front gate area. While standing inside of the gated area (2) males approached me. Suspect #1 approached me first and the following conversation took place: Suspect: ‘Hey I got fourteen.’ (Street vernacular for \$14 worth of narcotics) Officer: ‘What did you need my friend?’ Suspect: ‘Rock.’ (Street vernacular for cocaine base) Officer: ‘Okay how much again?’ Suspect: ‘Fourteen.’ Officer: ‘No problem.’ The suspect handed me folded money through the gate. In exchange, I handed the suspect (3) wafers of facsimile cocaine base. The suspect received the facsimile narcotics, stepped away from the gate and waited for suspect #2. Suspect #2 then walked up to me and stated, ‘Hey I need ten man.’ As suspect #2 handed me folded money. In exchange for the money I handed suspect #2 (2) facsimile wafers of cocaine base. Suspect #1 and #2 both walked away eastbound from our location. At that point, I gave a pre-arranged signal to have both suspects arrested for 664/11350(a) H&S. Officer Arevalo and Solorio

conducted a pedestrian stop on suspect #1 just east of our location. While the officers approached suspect #1, suspect #2 began running eastbound Leeward towards Magnolia and out of our sight. Officers were unable to locate suspect #2. While detaining suspect #1 the officers were unable to find any facsimile narcotics on his person. The money suspect #1 handed me was \$12 and suspect #2 had given me \$10.”

At the preliminary hearing, only Officer Oropeza testified, and, during direct examination, he never mentioned Detective Gasca. On cross-examination, Officer Oropeza stated merely that he was with his partner “Detective Gaskin” and they were inside the gate at the location.

After reviewing the moving and opposing papers, the trial court denied the *Pitchess* motion as to Detective Gasca. In making its ruling, the trial court observed, “I would agree with you there is a specific scenario as to Oropeza who wrote the report and testified apparently at the preliminary hearing. [¶] As to . . . — . . . Detective Gasca—I know Oropeza says he is there with him, but there is nothing that indicates that he saw this, knows about this, agrees to this. I know you want to assume that, but do we have any information that Detective Gasca knows anything about this other than Oropeza saying he was there? [¶] Based on [defense counsel’s] declaration, it appears that it was someone else that actually did that, and then it went a step further. I don’t see where Officer Gasca is identifying the defendant as the person that did this. Even with the [preliminary hearing] transcript read with the police report, they still didn’t have him near the front gate. I don’t know what he sees, what he hears. I don’t know anything. [¶] Again, I am very leery to release privileged information based on speculation. I will grant the motion as to Officer Oropeza. It will be granted as to falsification and fabrication of evidence and/or probable cause.”

Immediately following the court’s ruling, defense counsel requested and the trial court granted discovery as to Detective Gasca’s involvement in the transaction so that defendant could renew his *Pitchess* motion. “[Defense Counsel]: Your Honor, at this point I am making an oral discovery request for specifically this point that the District Attorney turn over information regarding Officer Gasca’s involvement and his

observations of whether or not he would corroborate and could make the identification so that I can renew the *Pitchess* as to - - [¶] [The Court]: I think that is a valid discovery request. Find out, I guess for the next court date, if Detective Gasca can testify to everything [Officer] Oropeza wrote in the report.” Notwithstanding the trial court’s order granting discovery, it appears that defendant did not renew his *Pitchess* motion as to Detective Gasca before the detective testified, nor did he make such a motion after the detective testified.

2. *Applicable Law*

A trial court’s order denying discovery of a police officer’s personnel records is subject to an abuse of discretion standard of review. “A trial court’s ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535 [113 Cal.Rptr. 897, 522 P.2d 305].)” (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

Evidence Code section 1043 requires that a party seeking discovery of a police officer’s records must file a written motion that describes the records sought and includes an affidavit that establishes good cause for the disclosure. “To initiate discovery, the defendant must file a motion supported by affidavits showing ‘good cause for the discovery,’ first by demonstrating the materiality of the information to the pending litigation, and second by ‘stating upon reasonable belief’ that the police agency has the records or information at issue. ([Evid. Code,] § 1043, subd. (b)(3).) This two-part showing of good cause is a ‘relatively low threshold for discovery.’ ([*City of*] *Santa Cruz v. Municipal Court* (1989)) 49 Cal.3d [74,] 83.)” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.)

“To show good cause as required by [Evidence Code] section 1043, defense counsel’s declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges. The declaration must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence (*People v. Husted* [(1999)] 74 Cal.App.4th [410,] 417; *Larry E. v. Superior Court*

(1987) 194 Cal.App.3d 25, 32–33 [239 Cal.Rptr. 264]) that would support those proposed defenses. These requirements ensure that only information ‘potentially relevant’ to the defense need be brought by the custodian of the officer’s records to the court for its examination in chambers. (*People v. Mooc* [(2001)] 26 Cal.4th . . . 1216; *Santa Cruz, supra*, 49 Cal.3d at p. 84.) [¶] Counsel’s affidavit must also describe a factual scenario supporting the claimed officer misconduct. That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report.” (*Warrick v. Superior Court, supra*, 35 Cal.4th at pp. 1024-1025.)

3. *No Abuse of Discretion*

Here, counsel’s affidavit in support of the motion alleged only two allegations of officer misconduct as to Detective Gasca—that he falsified the police report and submitted false testimony at the preliminary hearing. But, Detective Gasca did not write the police report or testify at the preliminary hearing. Moreover, there was nothing in the report to suggest that Detective Gasca contributed to any of the information contained in the report or that he even witnessed the transaction. The description of the transaction as written by Officer Oropeza was in the first person singular and did not state or imply that Detective Gasca was in any way directly involved in that transaction. At best, the report and hearing transcript established that Detective Gasca was inside the front gate with Officer Oropeza but, as the trial court noted, nothing before the court indicated what the detective saw, heard, or did on the evening of defendant’s arrest. And, counsel’s declaration describes a scenario in which *the arresting officers* (uniformed) became upset with defendant because his companion ran away from them. Because the police report and the preliminary hearing transcript state that uniformed police officers made the arrest, not Detective Gasca, the scenario of officer misconduct described in the declaration cannot apply to the detective, who was not a uniformed officer and did not make the arrest. Given the information that was before the trial court on the *Pitchess* motion, it was not an abuse of discretion for the court to deny the motion as to Detective Gasca.

That the trial court granted defendant discovery and an opportunity to renew his *Pitchess* motion as to Detective Gasca supports our conclusion that there was no abuse of discretion. Although it denied defendant's *Pitchess* motion as to Detective Gasca, the trial court nevertheless provided defendant with an opportunity to discover the amount of involvement Detective Gasca had in the transaction. Whether defendant availed himself of that opportunity is not clear from the record. What is clear, however, is that defendant never renewed his *Pitchess* motion as to Detective Gasca. Thus, the denial of the *Pitchess* motion was appropriate based on the facts then before the trial court.

B. In Camera Hearing as to Officer Oropeza

Relying on *People v. Mooc* (2001) 26 Cal.4th 1216, defendant requests that we review the records of the in camera proceeding as to Officer Oropeza to determine if any discoverable information was withheld. Consistent with customary procedure, the transcript of the in camera hearing held by the trial court has been made part of the record on appeal but has been sealed, and appellate counsel for defendant has not been permitted to review it. We have made an independent examination of that transcript and conclude that the trial court did not abuse its discretion in refusing to disclose the contents of Officer Oropeza's personnel file.

C. Attorney Fees

During the sentencing hearing, the trial court ordered defendant to pay \$2,755 in attorney fees, but there is nothing in the record to indicate that defendant had prior notice of the trial court's intention to impose fees or that the trial court held a hearing on the issue of defendant's ability to pay fees. (See § 987.8.)⁵ Defendant contends that in

⁵ "Section 987.8 authorizes the [trial] court to order criminal defendants to pay all or part of the cost of their appointed counsel after the trial court determines the defendant has a present ability to pay. (Footnote omitted.) The ability to pay includes the defendant's reasonably discernible future financial position, limited to the next six

addition to erring by denying defendant notice and a hearing on the fee issue, the trial court also erred in ordering defendant to pay fees when there was no evidence in the record to support the amount ordered and no evidence of defendant's ability to pay the fees.

The Attorney General contends that defendant forfeited his challenge to the order requiring him to pay attorney fees by failing to object to the order in the trial court. At the sentencing hearing, when the trial court announced its intention to impose fees, defendant's counsel did not object to the order on the ground of lack of notice or to the amount of the fees. Nor did counsel request a hearing on defendant's ability to pay the fees or object on evidentiary grounds. "Ordinarily, an appellate court will not consider a claim of error if an objection could have been, but was not, made in the lower court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589–590 [20 Cal.Rptr.2d 638, 853 P.2d 1093] (*Saunders*))." The reason for this rule is that "[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided." (*People v. Vera* (1997) 15 Cal.4th 269, 276 [62 Cal.Rptr.2d 754, 934 P.2d 1279] (*Vera*); see *Saunders, supra*, 5 Cal.4th at p. 590.) "[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error." (*People v. Kennedy* (2005) 36 Cal.4th 595, 612 [31 Cal.Rptr.3d 160, 115 P.3d 472].)" (*People v. French* (2008) 43 Cal.4th 36, 46.)

Defendant counters that a challenge to the sufficiency of the evidence in support of a finding can be raised for the first time on appeal, citing *People v. Lopez, supra*, 129 Cal.App.4th 1508. In *Lopez*, the court held that a defendant could challenge for the first time on appeal the sufficiency of the evidence in support of an order requiring the defendant to pay attorney fees under section 987.8. According to the court in *Lopez*, "In

months. (§ 987.8, subd. (g)(2)(B).)" (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537.)

the absence of a guilty plea, the sufficiency of the evidence to support a finding is an objection that can be made for the first time on appeal. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 262 [70 Cal.Rptr.2d 334, 949 P.2d 31]; *People v. Jones* (1988) 203 Cal.App.3d 456, 461 [249 Cal.Rptr. 840], disapproved on another ground by *People v. Tenner* (1993) 6 Cal.4th 559, 566, fn. 2 [24 Cal.Rptr.2d 840, 862 P.2d 840].)” (*People v. Lopez, supra*, 129 Cal.App.4th at p. 1537.)

Defendant challenges the sufficiency of the evidence in support of the amount of the fees and in support of the implicit finding of his ability to pay the fees. Thus, under *People v. Lopez, supra*, 129 Cal.App.4th 1508, he can raise such challenges for the first time on appeal.⁶

As to the merits of defendant’s challenge to the attorney fees order, the Attorney General concedes that, if the issue has not been forfeited, defendant was entitled to notice and a hearing on his ability to pay attorney fees. The Attorney General also agrees that the proper remedy is to remand to the trial court with directions to hold such a hearing. (See *People v. Flores* (2003) 30 Cal.4th 1059, 1068.) Accordingly, the attorney fees order is reversed, and the matter is remanded to the trial court with directions to provide a hearing on defendant’s ability to pay attorney fees.

⁶ Because we have concluded that defendant can raise his challenge to the sufficiency of the evidence in support of the attorney fees order for the first time on appeal, we do not reach his alternative contention that his trial counsel, a public defender, was ethically prohibited from objecting to the attorney fees order. (See *People v. Viray* (2005) 134 Cal.App.4th 1186, 1215-1216.)

DISPOSITION

The attorney fees order is reversed and remanded with directions to hold a hearing on defendant's ability to pay attorney fees. Otherwise, the judgment of conviction is affirmed.

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.